The rule gives the court a discretion which must be exercised judicially. It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits. An appellate court can only interfere with the exercise of the discretion if the court below has clearly acted on some wrong principle, committed some error of law or failed to consider matters which demanded consideration. I cannot think that in dealing with the application under Order 13 rule 10 the learned judge committed any error of law. Neither did he fail to consider all matters demanding consideration nor act on any wrong principle. In my view all the elements are present in this case which would justify the exercise of discretion in favour of the respondents.

In my view, the respondents have disclosed a defence on the merits.

**Wan Suleiman** and **Chang Min Tat F.JJ.** concurred.

*Order accordingly.*

Solicitors: *Nik Hussain, Ibrahim & Abdullah; Zain & Co.*

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## TONG LEE HWA & ANOR. v. LEE YOKE SAN

**[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman and Chang Min Tat F.JJ.) March 22 and September 1, 1978]**

**[Kuala Lumpur — Federal Court Civil Appeal No. 127 of 1977]**

*Practice and Procedure — Res Judicata — What constitutes.*

The respondent in this case claimed for work done as a valuer at the request of the appellants. There was a question as to whether the work was done for the appellants personally or for a company known as Chi Liung & Sons Sdn. Bhd. or for the estate of Chi Liung. On an application by the respondent to sign final judgment an order of court was made on March 26, 1973 that the application be withdrawn with liberty to join the other parties involved in the Probate Suit relating to the estate of Chi Liung. The respondent did not avail himself of this liberty but instead made an application by way of motion to strike out the defences of the appellants as disclosing no reasonable answer and as being frivolous and vexatious and to sign final judgment. At the hearing of the motion, an order in terms was made ([1978] 2 M.L.J. 112). The appellants appealed and at the appeal chose to rely on *res judicata* on the ground that the order of March 26, 1973 was a judgment in bar of the subsequent notice of motion.

**Held,** dismissing the appeal: it had not been shown that the earlier judgment necessarily and with precision determined the point in issue, that is, the liability of the appellants to pay the respondent for work done at their request and therefore the plea of *res judicata* must fail.

*Case referred to:-*

(1) *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.* [1964] A.C. 993; [1964] M.L.J. 49.

FEDERAL COURT.

*P.S. Abraham* for the appellants.

*S.D.K. Peddie* for the respondent.

*Cur. Adv. Vult.*

**Chang Min Tat F.J.** (delivering the judgment of the Court): At the appeal, counsel for the appellants elected deliberately to rely only on *res judicata.*

He had another ground of appeal. It was to the effect that the claim of the respondent against the appellants for work done at the request of the appellants should not be met by the appellants as it was done for and on behalf of a company known as Chi Liung & Sons Sdn. Bhd. and also for and on behalf of the estate of Chi Liung. The appointment of the respondent was by the appellants and though the former accepted the appointment as valuer for the estate, there was nothing in the letter dated May 28, 1970 to indicate that the appointment was as such valuer. Having regard to the agreement between the beneficiaries of the estate made on December 15, 1969 that the parties were to act in their personal capacities or their representative capacities or both, and the terms of the said letter, the appointment was more likely to be as valuer of and not for the estate.

Undoubtedly, counsel for the appellants considered that the law was against him on this contention. He therefore chose to rely entirely on the application of the principle of *res judicata.* The contention was directed to an application by the plaintiff to sign final judgment, on which the order of the court made on March 26, 1973 was that the application was withdrawn with liberty to join the other parties involved in the Probate Suit involving the estate of Chi Liung.

The respondent however did not avail himself of the liberty and instead made an application by notice of motion to strike out the defences of the appellants as disclosing no reasonable answer and as being frivolous and vexatious and to sign final judgment. At the hearing of the notice of motion, an order in terms was made. From that order, this appeal lay and it was said that the order of March 26, 1973 was a judgment in bar of the subsequent notice of motion.

At the hearing of the appeal, it was put to counsel for the appellants that to constitute a *res judicata*, the earlier judgment must, in terms of the Privy Council decision in *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.*,[1] "necessarily and with precision" determine the point in issue, and he was asked to indicate to the court how the earlier judgment did necessarily and with precision determine the liability of the appellants to pay the respondent for work done for them at their request. He did not do so. We do not, with respect, see how he could succeed.

We did not feel any necessity to call on counsel for the respondent and we accordingly dismissed the appeal.

*Appeal dismissed.*

Solicitors: *T. Tharu & Co.; Skrine & Co.*

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